United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 5, 2004

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: UFCW Local 1001; Nikkei Concerns
d/b/a Seattle Keiro Skilled Nursing Facility
Case 19-CB-9093; 19-CA-29200

524-5090-3800
548-6040
548-6050-8700

This case was submitted for advice as to whether the Region should issue a complaint alleging that the Union and the Employer violated Sections 8(b)(1)(A), 8(b)(2) and 8(a)(3) by maintaining and enforcing a union security clause that explicitly requires removal of employees from the work schedule, rather than the discharge of those employees, for failure to pay dues.

We conclude that, in the circumstances of this case where the Charging Party voluntarily quit employment rather than meet her financial obligations after being told she was removed from the work schedule, the charge should be dismissed, absent withdrawal, as it is not an appropriate vehicle with which to present the Board the open issue of whether parties may enforce a union security clause by some explicit "penalty" short of discharge when it is the only penalty contemplated by the parties.

FACTS

The Employer (Nikkei Concerns d/b/a Seattle Keiro Skilled Nursing Facility) operates a nursing facility and childcare center in Seattle. The Union (UFCW Local 1001) was certified as representative of the nursing facility on November 7, 2002. On August 11, 2003,[1] the parties agreed to a collective-bargaining agreement containing the following provisions:

[1] Herein all dates are 2003 unless otherwise indicated.

> **2.1 Union Membership -** It shall be a condition of employment that all employees of the Employer covered be this Agreement and all employees hired into the . . . bargaining unit after the effective date of this agreement shall, by the 30th day following such employment, become and remain in good standing with the Union through the payment of normal dues and initiation fees . . . . Employees who lawfully object to a "Union Shop" shall be granted alternatives as provided under the NLRA.
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> **2.5 Failure to Pay Dues -** Employees who fail to comply with the dues requirement . . . shall be removed from the schedule by the Employer within a 14-day grace period, excluding weekends and holidays, after receipt of written notice to the Employer from the Union. If during the grace period the employee fulfills the membership obligation set forth in this Agreement, no action by the Employer shall be required. If after being removed from the schedule, the employee subsequently meets his/her obligations under Section 2.1, s/he shall be restored to any available work and to his/her normal schedule at the next posted schedule.

It is undisputed that both the Union and the Employer preferred the above provision, requiring removal of an employee from the work schedule, to one that would have required an employee's outright discharge, for failure to pay dues. The Union negotiator testified that the Union proposed removal from the work schedule, rather than discharge, to enable employees to retain their jobs once they became current on their dues. The Employer negotiator testified that removal from the work schedule, rather than discharge, ensured the Employer continued coverage of the nursing home facility and eliminated problems regarding seniority, vacation, and sick leave accrual.[2]

The parties never specifically discussed whether, in addition to the right to request an employee's removal from the schedule for failure to pay dues, the Union retained the right to request an employee's termination. According to the Union negotiator, by agreeing to that language, the

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[2] The Employer's negotiator also stated that "if an employee does not remedy the problem, the effect is the same as discharge since they are just never put back on the schedule."

Union "would only be requesting removal from the schedule and would not ask for discharge or have the right to request discharge."

Charging Party Nhu-Y Pham began working for the Employer in January 2003. By letter of September 18, the Union notified all bargaining unit members, including Nhu-Y Pham, that the contract had been ratified. The letter explained the Union security provisions and told employees that the monthly dues would begin on October 18.[3] According to the Union, the letter contained a membership application (with an explanation of Beck[4] rights) and a dues check-off form. On October 30, the Union sent Nhu-Pham a reminder letter that it had not received her dues. On Nov 14, and again on November 18, the Union sent letters to Nhu-Y Pham stating that the Union intended to request that she be removed from the work schedule if she failed to pay her dues.[5] On November 25, the Union emailed the Employer requesting that a number of employees, including Nhu-Y Pham, be removed from the work schedule for failure to fulfill their financial obligations. The other employees then fulfilled their financial obligations and remained on the work schedule. On December 15, the Employer told Nhu-Y Pham that she still owed dues, and that she was being removed from the schedule. Nhu-Y Pham refused to pay her dues. The Employer told Nhu-Y Pham that she had to pay her dues or she could not work, and Nhu-Y Pham, who said she did not want to be with the Union, voluntarily quit her employment. Neither the Charging Party's charge nor her statement take issue with the distinction between whether the Union could lawfully seek her removal from the work schedule, as opposed to seeking her discharge, under the union security agreement.

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[3] The dues were 1.35% of gross monthly wages, with a minimum dues payment of $19.00 and a maximum payment of $21.00.

[4] Communication Workers v. Beck, 487 U.S. 735 (1988).

[5] The Employer apparently mistakenly deducted dues from Nhu-Y Pham's paycheck during the November 16-29 pay period, then stopped. On December 1, the Employer notified Nhu-Y Pham that she had been removed from the work schedule for failure to pay dues. When Nhu-Y Pham inquired at the human resources office, the office initially thought the notice was a mistake and sent her back to work.

ACTION

We conclude that, where the Charging Party voluntarily quit after being taken off the schedule rather than meet her union security obligations, this case is not the proper vehicle with which to present the Board the open issue in Krambo Food Stores, Inc.[6] of whether a union security provision allowing solely and specifically for a penalty less than discharge is lawful. Accordingly, the charges should be dismissed, absent withdrawal.

Sections 8(a)(3) and 8(b)(2) bar discriminatory treatment of employees based upon union membership because such treatment might discourage or encourage union affiliation – a matter that Congress determined should be left to the employees' own uncoerced judgment.[7] The Section 8(a)(3) proviso permits one exception to the all-inclusive ban on discriminatory treatment based upon union membership, namely, that employers and unions under certain circumstances may require employees to join or maintain their membership in a union as a condition of employment.[8] In construing the Section 8(a)(3) proviso, the Board has stressed the importance of keeping "employment rights separate from membership obligations owed to an employee's labor organization, such as the payment of dues."[9] Thus,

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[6] 106 NLRB 870, 883 n. 10 (1953).

[7] Id. at 877.

[8] Section 8(a)(3) contains two provisos. The first permits an employer and a union under specified circumstances to make an agreement requiring membership in the union as a condition of employment. The second proviso states "that no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . . "

[9] Furriers Joint Council of New York, 280 NLRB 922, 922 (1986).

the Board has cautioned that the proviso was not "designed to give employers and unions a license to use various discriminatory devices, short of discharge, to coerce an employee to join the union while still holding over his head the alternate threat of discharge which the statute sanctions."[10]

Applying these principles, the Board has consistently rejected attempts by unions to impose lesser forms of discipline on a delinquent employee, while still reserving their right to demand the employee's discharge.[11] In Krambo Food Stores, for example, an employer violated Section 8(a)(3) when, at the union's request, it withheld vacation pay from employees for failure to pay back dues. The Board concluded that, as the union "never abandoned its right to demand [the employees'] discharge," the withholding of their vacation benefits "was an additional discrimination, over and above the threat of discharge, and not a lesser one."[12] The Board found "no legislative sanction for the imposition of supplementary discrimination of this character."[13] Similarly, in Bartenders Local 332,[14]

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[10] Krambo Food Stores, 106 NLRB at 877.

[11] See, e.g., Pittsburgh Press Co., 241 NLRB 666 (1979)(union entitled only to request employer to discharge employee for nonpayment of dues, and not to take additional action of removing his name from the work schedule); Association of Western Pulp & Paper Workers, 170 NLRB 49, (1968), enfd. 431 F.2d 1206 (9th Cir. 1970)(union unlawfully offered to withdraw its demand that two employees be discharged for dues delinquency in return for back dues, a reinstatement fee, and a fine. The Union could have waived its right to terminate for dues delinquency, or imposed internal penalties unrelated to the member's employment status, but it could not invoke some other penalty regarding their continued employment); Musicians Union Local 47, 255 NLRB 386, 390 (1981)(union, which accepted responsibility as employer's conduit for transmitting paychecks, unlawfully withheld employee's paychecks until he paid delinquent dues. The union must maintain the statutorily mandated separation between employment rights and membership obligations).

[12] 106 NLRB at 877-888.

[13] Ibid. See also Mailers Union Local No. 7, 262 NLRB 851, 854 (1982)(union unlawfully deprived employee of overtime

the Board held that a union's attempt to cause the employer to reduce an employee's job seniority as a result of nonpayment of dues, while still holding over his head the alternative threat of discharge, was discriminatorily motivated.

Krambo and progeny make clear that a union may not demand lesser discipline and still hold the threat of discharge over the head of an employee for failure to pay dues. Although the Board articulated its decisions in those cases as based on the principle that discharge was the only employment action permitted against a delinquent employee, in none of those cases did the union impose the lesser discipline as a complete replacement for, rather than in addition to, the right to demand an employee's discharge. Thus, the Krambo line of cases do not necessarily stand for the proposition that the imposition of lesser penalties, standing alone, would violate the Section 8(a)(3) proviso. As the Board explained in Krambo, it was not passing on "whether or not a lesser penalty would be permissible if coupled with clear abandonment of the right of discharge; nor do we pass on whether or not a lesser penalty could be inflicted only if provided for by a specific contract provision."[15]

The instant case arguably presents the issues left open in Krambo. The union-security provision specifically provided only for removal of employees from the work list – a method other than discharge - to force compliance with

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work and forced him to work overtime because employee was delinquent in dues payment, while not demanding that the employer discharge the employee as it had a statutory right to do); Reading Tube Corp., 120 NLRB 1604 (1958) (union-security clause that denies contract privileges and benefits as a penalty in addition to discharge on account of nonpayment of dues, is an additional and supplemental discrimination beyond the permissive limits of Section 8(a)(3)); Furriers Joint Council of New York, 280 NLRB 922 (union unlawfully withheld vacation paychecks from its members until they paid their back dues, while never abandoning the right to demand their discharge).

[14] 259 NLRB 252 (1981).

[15] 106 NLRB at 883, fn. 10.

the Union's membership obligations.[16] We note that the nature of the sanction here also serves to maintain the separation between membership obligations and employment rights, consistent with the policy underlying the Board's decisions in this area.[17] There is also no evidence that the parties view removing an employee from the work schedule as anything other than the only penalty for enforcing the union security requirement.

However, the Charging Party, apparently the only employee who did not meet her or his lawful union security obligations, chose to voluntarily quit rather than remain an unscheduled employee, thus choosing the same result as would have existed if the parties had adopted a traditional union security clause specifying discharge for noncompliance. In these circumstances, this case is not an appropriate vehicle to present the Board with the issues remaining open in Krambo.[18] Accordingly, the charges should be dismissed, absent withdrawal.

B.J.K.

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[16] The union security clause itself (section 2.1) does not expressly provide for a specific penalty; it states that employees shall pay dues "as a condition of their employment."

[17] See, e.g., Furriers Joint Council of New York, 280 NLRB at 922. In contrast to the cited cases, removal from the work schedule here imposes no differential treatment between employees at the work place. Cf. Bartenders Local 332 (reduction in seniority). Moreover, it does not deny employees accrued benefits or pay. See Krambo (withholding vacation pay); Musicians Union (withholding paychecks).

[18] These considerations may not apply in other circumstances. If another charge is filed regarding the removal from the work schedule of an employee who remains on the payroll, the charge should be submitted to Advice.